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No. 07-1607

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

SUMMARY OF ARGUMENT

As the petition demonstrates, the Ninth Circuit has sanctioned an improper expansion of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. sections 9601-9675, by broadly defining those who have "arranged for disposal" of hazardous

[1] This brief was authored by *amicus* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to rule 37 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this brief. Letters indicating their consent are being submitted with this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

waste under 42 U.S.C. section 9607(a)(3) to include a manufacturer like Shell who shipped a useful product that later leaked after it left the manufacturer's ownership and control. This potentially far-reaching and ill-defined form of CERCLA liability is contrary to CERCLA's plain language and structure and both deepens existing circuit splits and creates new ones with regard to three different aspects of "arranger" liability.

First, contrary to the Sixth and Seventh Circuits' interpretation, the Ninth Circuit panel held that arranger liability does not require an intent to dispose of hazardous substances. Rather, because CERCLA's definition of "disposal" includes "leaking" and "spilling," the panel concluded a defendant may be liable as an arranger in the absence of "purposeful" conduct. Pet. App. 44a. In so ruling, the panel failed to acknowledge that the statute's plain language – in particular, its use of the phrase "arranged for disposal" – requires intentional conduct directed at carrying out disposal of hazardous material.

Second, parting ways with other circuits that have considered the question, the Ninth Circuit panel expanded arranger liability through its related, but distinct, ruling that "disposal" under CERCLA can encompass a manufacturer's shipment of new, useful products to its customers. Pet. App. 45a. In reaching this result, the panel failed to take into account that CERCLA's definition of "disposal" is expressly limited to waste, and that the term "disposal" itself connotes the act of discarding useless matter. By so holding,

the panel effectively eviscerated the "useful product" doctrine in the Ninth Circuit, which until now has ordinarily prevented shippers of useful products from being held liable for the cost of cleaning up their customers' hazardous waste sites.

Finally, the panel concluded that whether Shell owned the substance in question at the time of the asserted disposal "is not an informative consideration," and that control of the disposal process "is informative only in light of additional considerations." Pet. App. 49a. The panel thereby added to a jumble of conflicting decisions by the Ninth Circuit and other circuits concerning the relevance of ownership and control to "arranger" liability.

If the Ninth Circuit's opinion is left undisturbed, its secondary and tertiary impacts will be widely felt throughout our economy. The transfer of billions of dollars in clean-up costs to those who do no more than manufacture and ship new products in the chain of commerce is certain to adversely impact prices, job creation, and insurance premiums. While Congress could have chosen to impose such liability, there is no indication in the language of CERCLA that it did so.

Therefore, this Court should grant certiorari to resolve the circuit splits created and perpetuated by the Ninth Circuit's decision. In so doing, it will provide critically needed guidance to the lower courts and bring nationwide uniformity to this important aspect of CERCLA liability.

STATEMENT OF THE CASE

Amicus hereby adopts and incorporates by reference the Statement of the Case set forth in Petitioner's Brief.

ARGUMENT

I. ARRANGER LIABILITY UNDER CERCLA REQUIRES INTENTIONAL CONDUCT DIRECTED AT DISPOSAL.

CERCLA "was designed to deal with the problem of inactive and abandoned hazardous waste disposal sites." *3550 Stevens Creek Assoc. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1363 (9th Cir. 1990). It "sets forth a comprehensive scheme for the cleanup of hazardous waste sites, and imposes liability for cleanup costs on the parties responsible for the release or potential release of hazardous substances into the environment." *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1072 (9th Cir. 2006).

One of four types of potentially responsible parties ("PRPs") liable for clean-up costs under CERCLA is an "arranger" – one who arranges for the disposal of hazardous substances. An "arranger" is defined as:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by

> such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. . . .

42 U.S.C. § 9607(a)(3) (2006).

The circuit courts are deeply divided about what the plain language[2] of section 9607(a)(3) means. Two circuits, the Sixth and Seventh, have concluded that Congress's decision to impose CERCLA liability on those who "arrange[ ] for disposal or treatment . . . of hazardous substances" implies a requirement of intentional conduct directed toward such disposal or treatment. For example, in *Amcast Industrial Corp. v.*

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[2] "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *accord Negonsott v. Samuels*, 507 U.S. 99, 104-05 (1993). The plain language of CERCLA is particularly critical to its interpretation because its legislative history is widely considered to be of little value in determining Congress's intent. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 885 (9th Cir. 2001) ("Any inquiry into CERCLA's legislative history is somewhat of a snark hunt. Like other courts that have examined the legislative history, we have found few truly relevant documents."); *United States v. CDMG Realty Co.*, 96 F.3d 706, 713 n.2 (3d Cir. 1996) (finding CERCLA's legislative history "unhelpful . . . sparse and often inconsistent"); David Brose, *Ending the Arranger Debate: Integrating Conflicting Interpretations in Search of a Uniform Approach*, 10 Mo. Envtl. L. & Pol'y Rev. 76 (2003) ("[A]s a consequence of the unusually rapid passage of this legislation, there is little legislative history to guide the courts in interpreting the statute.").

Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993), a case factually analogous to this one, the Seventh Circuit held that, under the plain language of section 9607(a)(3), a chemical manufacturer, Detrex, was not liable as an arranger merely because its product spilled onto its customer's premises from a common carrier's trucks:

> Detrex hired a transporter, all right, but it did not hire it to spill TCE on [the customer's] premises. Although the statute defines disposal to include spilling, the critical words for present purposes are 'arranged for.' The words imply intentional action. The only thing Detrex arranged for [the common carrier] to do was to deliver TCE to [the customer's] storage tanks. It did not arrange for spilling the stuff on the ground. No one arranges for an accident. . . .

Similarly, in *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996), the Sixth Circuit held that the existence of an intent requirement is dictated by the application of the canons of statutory construction to section 9607(a)(3):

> We derive the intent element from the canons of statutory construction. 'Otherwise arranged' is a general term following in a series two specific terms and embraces the concepts similar to those of 'contract' and 'agreement.' All of these terms indicate that the court must inquire into what transpired between the parties and what the parties had in mind with regard to disposition of the hazardous

> substance. Therefore, including an intent requirement into the 'otherwise arranged' concept logically follows the structure of the arranger liability provision.

(Citations omitted); *accord AM Int'l, Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993) ("Liability only attaches to parties that have 'taken an affirmative act to dispose of a hazardous substance'").[3]

As the Sixth Circuit explained in *Cello-Foil*, interpreting section 9607(a)(3) to require a showing of intent is consistent with CERCLA's scheme of strict liability for PRPs:

> [E]xamining state of mind or ascertaining intent at the contract, agreement, or other type of arrangement stage does not undermine the strict liability nature of CERCLA. The intent inquiry is geared only towards determining whether the party in question is a

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[3] The Eleventh Circuit has adopted a different approach. Under its test, the court must examine all of the evidence presented, keeping in mind the "broad remedial nature of CERCLA" and that the transaction in question has to be something more than a "mere sale" to show that the "manufacturers arranged for the disposal of hazardous waste by selling the [product]." *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1318-19 (11th Cir. 1990); *accord South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996). In contrast to the Sixth and Seventh Circuits, the Eleventh Circuit, therefore, has "reject[ed] any attempt to establish a *per se* rule in determining a manufacturer's liability under CERCLA." *Fla. Power*, 893 F.2d at 1318.

> potentially liable party. Once a party is determined to have the requisite intent to be an arranger, then strict liability takes effect.

Cello-Foil, 100 F.3d at 1232.

In stark contrast to the Sixth and Seventh Circuits, and in violation of CERCLA's plain language, the Ninth Circuit here adhered to the view that arranger liability does not require intentional conduct.[4] In reaching that conclusion, the panel neglected the statute's use of the term "arranged for" and focused exclusively on CERCLA's definition of "disposal," reasoning that because "'disposal' includes such unintentional processes as 'leaking' . . . 'disposal' need not be purposeful."[5] Pet. App. 44a; *accord Jones-Hamilton Co. v. Beazer Materials & Serv., Inc.*, 973

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[4] The same approach has been adopted by the Eighth Circuit. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) ("Citing dictionary definitions of the word 'arrange,' defendants argue they can be liable under section 9607(a)(3) only if they intended to dispose of a waste. . . . We reject defendants' narrow reading of . . . the statute.") (citation omitted).

[5] The Third Circuit, on the other hand, has observed that the terms "leaking" and "spilling" are not mutually exclusive of an intentional conduct requirement:

> We think there is a strong argument . . . that in the context of this definition, "leaking" and "spilling" should be read to require affirmative human action. Both "leaking" and "spilling" also have meanings that require some active human conduct. . . . In the context of these words, then, Congress may have intended active meanings of "leaking" and "spilling."

CDMG Realty Co., 96 F.3d at 714.

F.2d 688, 695 (9th Cir. 1992) (holding company that supplied chemicals to formulator under agreement that "contemplated 2% spillage of materials" had "arranged for disposal" of hazardous substances).

The Ninth Circuit panel reasoned that CERCLA's broad remedial purpose supported such a broad definition of "arranger" liability because otherwise government agencies and eventually the taxpayers would be "left holding the bag for a great deal of money" to clean up environmental sites. *See* Pet. App. 3a, 26a, 45a. The panel explained, "[w]e have avoided giving the term 'arranger' too narrow an interpretation to avoid frustrating CERCLA's goal of requiring that companies responsible for the introduction of hazardous waste into the environment pay for the remediation." Pet. App. 42a.

But it is not the role of the courts to second-guess the framework Congress has established for funding cleanups, or to expand the scope of CERCLA beyond the statute's plain language and structure. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989) (The task of statutory interpretation "begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (citation omitted); *United States v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001) (CERCLA's "'broad remedial purpose'" cannot be construed inconsistently with the statute's plain language); *see also Stevens Creek*, 915 F.2d at 1363 (notwithstanding the remedial purpose of

CERCLA, "we must reject a construction that the statute on its face does not permit, and the legislative history does not support.").

As one commentator on CERCLA statutory construction has observed:

> It is well-accepted that the remedial purpose canon has little utility when an expansive interpretation would contradict the plain meaning of the statute. Even those who disagree with a textualist approach to statutory construction acknowledge that there is a hierarchy among interpretive principles, and that the prevailing view is 'that the statutory text is the most authoritative interpretive criterion.' Thus, when deciding whether to apply the remedial purpose canon, the courts have made it clear that a judge charged with interpreting a statute must respect the primacy of the text.

Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 243-44 (1996) (footnotes omitted).

Moreover, the Ninth Circuit's concern that ordinary taxpayers will unfairly bear the burden of clean-up costs is misplaced. *See* Pet. App. 26a. It is not the taxpayers *per se* who fund clean-ups when solvent PRPs cannot be located. Rather, Congress's 1986 amendments to CERCLA create a Superfund that funds clean-up activities. *See* 26 U.S.C. § 9507 (2006); 42 U.S.C. §§ 9604-05 (2006). The Superfund

is financed by a combination of appropriations, industry taxes and judgments obtained in legal actions to recover response costs. *See* 26 U.S.C. § 9507(b) (2006). Accordingly, rather than doing violence to the statutory text by stretching the limits of arranger liability beyond their appropriate bounds, the proper approach is to presume that if a party is not a PRP under CERCLA's plain language, Congress intended for the Superfund – including industry taxes – to fund the clean-up.

As district courts around the country have previously observed, there is an irreconcilable and widening circuit split concerning whether intentional conduct is required for arranger liability under CERCLA. *See In re Voluntary Purchasing Groups, Inc.*, 2002 WL 31156535 at *6 (N.D. Tex. 2002) (unreported) ("The Eighth Circuit in *Aceto* differs from the Seventh [in *Amcast*] in holding that an arranger need not have an intent to dispose of hazardous materials"); *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523 (D. Colo. 1996) ("As to the term 'arranged for,' . . . several courts in other circuits have grappled with this important issue. Three leading cases regarding this issue have each taken different approaches in interpreting 'arranged for.'") (citations omitted); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1138-39 (N.D. Fla. 1994) (noting conflict between intent requirement of the Seventh Circuit and the looser Eleventh Circuit approach); *see also* Brose, *supra*, at 77 ("Modern courts have adopted three approaches in applying arranger liability: (1) a strict liability

approach; (2) a specific intent approach; and (3) a 'totality of the circumstances,' case-by-case approach."). The Ninth Circuit has only added to this divergence of authority, placing it squarely at odds with the Sixth and Seventh Circuits on this important issue. This Court should grant the petition and provide needed guidance to the lower courts by resolving this conflict.

II. ARRANGER LIABILITY UNDER CERCLA REQUIRES THE DISPOSAL OF HAZARDOUS WASTE, NOT MERELY THE SHIPMENT OF USEFUL PRODUCTS.

Before the Ninth Circuit's holding below (Pet. App. 45a-46a), no federal appeals court had ever held that the mere shipment of a useful product to a customer can give rise to arranger liability for the shipper when that product leaks on the customer's property after delivery. By so holding, the Ninth Circuit has contravened CERCLA's definition of "disposal," and placed itself in conflict with several other circuits that have held arranger liability does not attach to the sale of a useful product.

CERCLA borrows its definition of disposal from the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6901, *et seq.* (2006).[6] *Freeman v. Glaxo Wellcome,*

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[6] The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 *et seq.* (2006), amended the SWDA in 1976 and the terms RCRA and SWDA may be used interchangeably.

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Inc., 189 F.3d 160, 164 (2d Cir. 1999) ("Congress expressly incorporated into CERCLA the definition of 'disposal' from the Solid Waste Disposal Act."). The SWDA defines "disposal" exclusively in terms of the disposal of *waste*. 42 U.S.C. § 6903(3) (defining "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any *solid waste* or *hazardous waste* into or on any land . . . so that [it] may enter the environment or be emitted into the air or discharged into any waters, including ground waters.") (emphases added); Ian Erickson, Comment, *Reconciling the CERCLA Useful Product and Recycling Defenses*, 80 N.C. L. Rev. 605, 612 (2002) ("The RCRA definition requires the disposal of a 'waste,' not a 'substance.'").

As a result, numerous courts, including the Ninth Circuit in the past, have held that CERCLA applies *only* to the disposal of material that may be characterized as "waste." *Freeman*, 189 F.3d at 164 ("Because the definition of 'disposal' refers to 'waste,' only transactions that involve 'waste' constitute arrangements for disposal within the meaning of CERCLA."); *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 750 (9th Cir. 1994) ("In *Stevens Creek*, we agreed with other circuits that 'disposal' refers 'only to an affirmative act of discarding a substance as waste, and not to the productive use of the substance.'") (quoting

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Courtaulds Aerospace, Inc. v. Huffman, 826 F. Supp. 345, 349 & n.4 (E.D. Cal. 1993).

Stevens Creek, 915 F.2d at 1362); *accord Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 565 (9th Cir. 1994).

Courts have also found the scope of arranger liability is limited to the disposal of waste because the words "disposal" and "treatment," as used in the SWDA, connote the act of discarding a substance. *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 774 (4th Cir. 1998) (the SWDA's "definition of 'treatment' presupposes discard. . . . Therefore, 'treatment . . . of hazardous substances' as used in CERCLA refers to a party arranging for the processing of *discarded* hazardous substance or processing resulting in the discard of hazardous substances.") (emphasis added); *Amcast*, 2 F.3d at 751 ("The words 'arranged with a transporter for disposal or treatment' appear to contemplate a case in which a person or institution that wants *to get rid of its hazardous wastes* hires a transportation company to carry them to a disposal site.") (emphasis added); *accord RSR Corp. v. Avanti Dev., Inc.*, 69 F. Supp. 2d 1119, 1126 (S.D. Ind. 1999).

Conversely, federal appeals courts have until now consistently held that one who merely sells a useful product does *not* arrange to discard waste and cannot be liable as an arranger for "disposal" under section 9607(a)(3). *Freeman*, 189 F.3d at 164 ("'[i]f a party merely sells a product, without additional evidence that the transaction includes an "arrangement" for the ultimate disposal of a hazardous substance, CERCLA liability [will] not be imposed.'") (quoting

Fla. Power, 893 F.2d at 1317); *Cello-Foil*, 100 F.3d at 1232 ("'Liability only attaches to parties that have "taken an affirmative act to dispose of a hazardous substance . . . as opposed to convey a useful substance for a useful purpose"'"), *quoting AM Int'l*, 982 F.2d at 999; Jason C. Kuhlman, *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., and CERCLA "Arranger Liability,"* 16 J. Nat. Resources & Envtl. L. 151, 159 (2002) ("the distinction between a sale of valuable property and an arrangement for treatment or disposal takes on great significance; a sale of a valuable commodity by definition cannot be a discarding of material.").

Indeed, the Ninth Circuit has previously recognized and applied this "useful product doctrine." *Stevens Creek*, 915 F.2d at 1362 ("[C]ourts in other circuits have construed 'disposal' for purposes of section 107(a)(3) as referring only to an affirmative act of discarding a substance as waste, and not to the productive use of the substance. [W]e see no reason to adopt a different definition in this case.") (citations omitted); *see also Cal. Dept. of Toxic Substances Control v. Payless Cleaners*, 368 F. Supp. 2d 1069, 1077 (E.D. Cal. 2005) (a manufacturer cannot "be held liable as a CERCLA arranger where it has done nothing more than sell a useful chemical") (citations omitted); *Courtaulds Aerospace*, 826 F. Supp. at 354 ("the 'sale of a useful product' defense applies when the sale is of a new product, manufactured specifically for the purpose of sale, or of a product that

remains useful for its normal purpose in its existing state.").

By its present holding, however, the Ninth Circuit has effectively broken with its own precedent and with the holdings of the Second, Fourth, Sixth, and Eleventh Circuits cited above. The Ninth Circuit panel here held that the useful product doctrine only applies when a substance is first used as intended. Pet. App. 45a. Based on this assumption, the panel concluded that the "useful product" doctrine has no application where "the sale of a useful product necessarily and immediately results in the leakage of hazardous substances." *Id.*

The Ninth Circuit's exceedingly narrow interpretation of the useful product doctrine turns CERCLA on its head. By imposing arranger liability on one who merely manufactures and ships new, useful products, the panel opinion exceeds CERCLA's express limitation of liability under section 9607(a)(3) to those who arrange to dispose of – i.e., to discard – waste. To be sure, a product is not useful *after* a leak has occurred but if, by such faulty logic, a useful product can be so readily transformed into "waste," there are no useful products for CERCLA's purposes and the doctrine has no meaning.[7] Arranger liability

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[7] The panel acknowledged as much by citing *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) as support for its interpretation. Pet. App. 45a-46a. The district court in *Zands* addressed whether the leakage of gasoline from underground storage tanks constituted the disposal of waste. The court found

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only arises after substances have been released, thereby terminating their usefulness.

The Ninth Circuit's narrow reading of section 9607(a)(3) vitiates the useful product doctrine and imposes a sweeping expansion of CERCLA liability that cannot be squared with the statute's language and structure. Therefore, this Court should grant the petition to resolve the circuit split created by the Ninth Circuit and to provide needed guidance concerning the applicability of arranger liability under CERCLA to shippers of useful products.

III. THE PETITION SHOULD BE GRANTED TO CLARIFY THAT OWNERSHIP OF WASTE AT THE TIME OF DISPOSAL, AND CONTROL OF THE DISPOSAL PROCESS, ARE NECESSARY FOR ARRANGER LIABILITY.

The Court should also grant the petition to resolve inter- and intra-circuit conflicts concerning the relevance of ownership and control to arranger liability under section 9607(a)(3). As deeply divided as the circuits are concerning all questions pertinent to arranger status, nowhere is there more confusion and less uniformity than on the issue of whether an alleged arranger must own the hazardous substance

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that it did, reasoning in circular fashion that "'gasoline is no longer a useful product after it leaks into, and contaminates, the soil.'" *Id.*

at the time of disposal, and whether it must control the disposal process.

Outside of the Ninth Circuit, the federal courts are divided on this issue. In *Aceto*, the Eighth Circuit held the defendant chemical manufacturers who contracted with a pesticide formulator could be liable as arrangers for the costs of cleaning up the formulator's property in part because the manufacturers "actually owned the hazardous substances, as well as the work in process." (*Aceto*, 872 F.2d at 1382.) In so holding, the Eighth Circuit cited its earlier holding in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743-44 (8th Cir. 1986) (*NEPACCO*), that liability may be imposed "on those who had the authority to control the disposal, even without ownership or possession." *Aceto*, 872 F.2d at 1382.

By contrast, the Second Circuit in *General Electric Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992), rejected the notion that authority to control the disposal process is sufficient, holding "that it is the *obligation* to exercise control over hazardous waste disposal, and *not the mere ability or opportunity to control* the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision." (Second emphasis added.) There, the court held that oil companies had not arranged for disposal of their service station tenants' waste motor oil because any control they exercised over their tenants' businesses was not

"directed toward either the generation of or the disposal of waste oil." *Id.* at 287-88.

The Sixth Circuit has taken yet another approach to the issue, rejecting control over the disposal process as a relevant consideration in deciding who is an arranger under CERCLA. In *Cello-Foil*, it observed that "a party can be responsible for 'arranging for' disposal, even when it has no control over the process leading to the release of substances." *Cello-Foil*, 100 F.3d at 1232. Instead, as discussed above, the Sixth Circuit found the key inquiry to be whether "a party possessed the requisite intent to be an arranger." *Id.* Thus, the federal appeals courts have taken divergent approaches to the relevance of waste ownership and control of the disposal process to arranger liability under section 9607(a)(3).

The same lack of consistency prevails within the Ninth Circuit. In *Cadillac Fairview*, the Ninth Circuit held that rubber companies who returned contaminated styrene to the producer for redistillation could be liable as arrangers notwithstanding the fact they did not own the styrene or control the redistillation process. *Cadillac Fairview*, 41 F.3d at 565 ("[W]e have extended liability under section 107(a)(3) to persons who have sold and therefore no longer own the hazardous substances, and to persons who have no control over the process leading to release of the substances.") (citations omitted).

Eight years later, the Ninth Circuit executed an apparent about-face in *United States v. Shell Oil Co.*,

294 F.3d 1045 (9th Cir. 2002). There, in the course of ruling on counter-claims by oil companies that the United States was partly liable as an arranger for the costs of cleaning up the sites of World War II-era aviation fuel refineries, the court stated: "We agree . . . that *control is a crucial element* of the determination of whether a party is an arranger under § 9607(a)(3)." *Id.* at 1055 (emphasis added). Citing the Eighth Circuit's decision in *NEPACCO*, the Ninth Circuit then concluded the United States lacked the ownership and control necessary for imposing arranger liability. *Id.* at 1057 ("In this case, the United States neither exercised actual control, nor had the direct ability to control, in the sense intended in *NEPACCO*. In this case, the waste never belonged to the United States. . . .").

Notwithstanding its holding in *Shell*, the Ninth Circuit again reversed course in its panel decision below. Responding to Shell's argument that it neither owned the product at the time of transfer to the buyer's storage tanks nor controlled the transfer process that resulted in spills, the panel determined that "ownership at the time of disposal is not an informative consideration, and control is informative only in light of additional considerations." Pet. App. 49a.

Accordingly, the relevance of ownership and control to the question of arranger liability is unsettled. The different federal circuits disagree and the Ninth Circuit's decisions are themselves difficult, if not impossible, to reconcile. Therefore, this Court

should grant the petition to decide whether ownership of the substance and control of the disposal process are necessary to the imposition of arranger liability under CERCLA.

IV. WITHOUT REVIEW BY THIS COURT, THE NINTH CIRCUIT'S DECISION WILL HAVE SEVERE AND FAR-REACHING ECONOMIC RAMIFICATIONS.

The negative economic consequences of the Ninth Circuit's holding are far-reaching. If everyone who ships a useful, potentially hazardous substance can be deemed a responsible party under CERCLA when that substance later spills or leaks, the reach of CERCLA liability will be nearly infinite. Suddenly, every shipper will be rendered the *de jure* insurer of the environmental purity of all of its customers' far-flung properties. The impact of such broad-based liability will reverberate through our economy, increasing the cost of doing business and directly or indirectly affecting consumers, workers, manufacturers, shippers and insurers alike.[8]

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[8] As explained above, CERCLA's language does not require such an ill-advised result. *See, e.g., Amcast*, 2 F.3d at 751 ("It would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products.").

The Ninth Circuit, in rejecting the notion that CERCLA creates a cause of action for the voluntary removal of asbestos from commercial buildings, has itself acknowledged such far-reaching adverse effects from expanding CERCLA liability. *Stevens Creek*, 915 F.2d at 1365. In recognizing the "substantial and far-reaching legal, financial and practical consequences" of expanding the reach of CERCLA, the court favorably cited the Fourth Circuit's decision in *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989), in which that court observed of the same question:

> To extend CERCLA's strict liability scheme to all past and present owners of buildings containing asbestos as well as to all persons who manufactured, transported, and installed asbestos products into buildings, would be to shift literally billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context. Certainly, if Congress had intended for CERCLA to address the monumental asbestos problem, it would have said so more directly when it passed [the 1986 "Superfund" amendments to CERCLA].

The same reasoning applies equally to the Ninth Circuit's ill-advised holding that shippers of useful products can now be liable as "arrangers" for paying the vast sums needed to clean up others' hazardous waste sites. The decision to shift potentially billions of dollars in clean-up liability in this fashion rests on

nothing more than an "improvident interpretation" of section 9607(a)(3).

If Congress had wished to extend CERCLA "arranger" liability to the shipment of useful products, it certainly could have selected the appropriate language to effectuate that result. It is not the function of the Ninth Circuit to make that policy determination. Therefore, this Court should uphold the primacy of CERCLA's text and forestall the negative ramifications of the Ninth Circuit's decision by determining the appropriate scope of arranger liability under CERCLA.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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